APPEAL NO. 93388

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On April 1, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The record was closed on May 3, 1993. The issues agreed upon at the CCH were: (1) whether claimant suffered a compensable repetitive trauma injury; and (2) whether claimant reported the injury to employer within 30 days of the day he knew or should have known his injury was work related. The hearing officer determined that the appellant, claimant herein, did not suffer an injury that arose out of and in the course and scope of his employment, but that claimant had established good cause for failing to notify employer of a work-related injury prior to (date of injury).

Claimant contends that the hearing officer misapplied the facts, the law, and the argument presented at the hearing, and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence, that the decision could and should be upheld on the separate ground that claimant failed to give his employer notice of his injury as required, and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified he was a structural welder for the employer. He testified that he began having pain and numbness in his left shoulder beginning in May 1992 (all dates are 1992 unless otherwise noted). Claimant had sustained a below the elbow amputation of his right arm in 1980 and wore a metal prosthesis. Claimant testified he first saw (Dr. D) M.D., an orthopaedic surgeon, on July 9th. Claimant testified that Dr. D had asked him if he had been hurt on the job and he had answered "no" because he was unaware of the repetitive nature of his injury. Dr. D treated claimant for muscle strain and left wrist tendonitis until October when he referred claimant to a neurologist, (Dr. P). After a cervical spine MRI and other diagnostic tests, on November 10th, Dr. P diagnosed claimant's condition as a "cervical disk herniation at C6-7 level, as well as bulging of C3-4, C4-5, and C5-6. EMG revealed findings consistent with a mild right C7 radiculopathy."

Claimant testified that after learning Dr. P's diagnosis on November 10th, he asked Dr. P if the disc herniation was work related and it was claimant's testimony that Dr. P replied "it could have been." Claimant testified he then called (Mr. M) employer's manager and told Mr. M of the herniated disc. Claimant's testimony was that Mr. M was "sarcastic," "very rude" and finally said, "O.K. keep me informed." Claimant stated after talking with Mr. M on November 10th, he telephoned the Texas Workers' Compensation Commission (Commission) and requested information for filing a claim. Claimant states he received the information from the Commission on Friday, November 13th and on the following day, November 14th, he received employer's letter dated November 13th, terminating him due

to excessive absences. It is undisputed that claimant reported his herniated disc as a work-related injury to the employer on November 16th. Claimant testified that although his left shoulder had been bothering him, he did not know the cause of his shoulder pain and that he did not identify his condition as being work-related. Mr. M testified that prior to November claimant did not know the cause of his shoulder problems. Mr. M also testified that claimant's duties included some "out of position" welding where claimant sat on the floor with his arms overhead welding components to the underside of assembled items. He also stated that some welders typically jerked their head forward in a quick-nodding motion to lower their welding hoods.

At the conclusion of the hearing on April 1, 1993, the hearing officer announced she planned to leave the record open and after reviewing the medical evidence she might write Dr. D and Dr. P propounding a question or two. The hearing officer indicated she would provide copies of the letters to the doctors and their responses to the parties and allow a reasonable time for the parties to comment or respond to the doctor's answers. Claimant testified what he believed the doctors would say but the hearing officer said she would rather hear the evidence directly from the doctors and that she had a responsibility to fully develop the facts and the record. After leaving the record open, the hearing officer wrote to Dr. D and Dr. P stating the claimant was claiming a repetitive trauma work injury and requesting a response to the following question:

> whether in reasonable medical probability there is a causal connection between [claimant's] work activities and the cervical disc herniation of the C6-7 level with right C7 mild radiculopathy. . . .

Dr. D replied:

> [Claimant] stated on (the July 9th) visit that the pain had been present for 1.5 months and that his occupation as a welder aggravated his symptoms.
>
> In retrospect it is possible that he had the cervical herniation that was later diagnosed by [Dr. P] by means of the MRI.

Dr. P replied in pertinent part:

> Repetitive trauma may difinitely (sic) be a factor in producing cervical disc disease and cervical disc herniation. Cervical disc disease may be aggravated by factors such as the repetitive neck movements and heavy lifting described by [claimant] as being part of his job. While such a causal relationship may exsist (sic), whether or not such significant repetitive trauma was indeed sustained must depend upon an intimate knowledge of the work place and work requirements, and not medical judgement.

The hearing officer made copies of her letters and the doctor's responses available to both parties and provided at least ten days for the parties to respond or comment. Apparently neither party did so as there is no response in the record. Although neither party commented on this procedure, we note it with our full approval.

The hearing officer found in pertinent part:

FINDINGS OF FACT

5.Claimant received treatment for a shoulder strain until November 10, 1992 when [Dr. P] diagnosed claimant's condition as a C6-7 disk herniation, bulging of C3-4, C4-5, and C5-6 with mild right C7 radiculopathy.

6.Claimant's duties as a welder included heavy lifting and maneuvering, some out of position welding, frequent standing and walking, and infrequent squatting with neck extended.

7.While claimant's work activities were strenuous at times, he did not establish that these activities were repetitively traumatic and causally related to his cervical spine condition.

8.Claimant did not know the cause or the nature of his left shoulder pain until November 10, 1992. He reported a work-related injury to employer on (date of injury), after receipt of claims information from the Commission.

CONCLUSIONS OF LAW

3.Claimant did not establish that he suffered a repetitive trauma injury that arose out of and in the course and scope of his employment for [employer].

4.Claimant established good cause for failing to notify employer of a work-related injury prior to (date of injury).

Claimant argues, among other things, that "[e]vidence of disability or lack of disability may be established by lay witnesses including Claimant," citing Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Even though the current case is not a disability case, we generally agree that a lay witness, including a claimant, can in some instances establish an injury based on lay testimony. However, we note that the claimant's testimony, as that of an interested party, only raises an issue of fact for the trier of fact, which in this case is the hearing officer. Escamilla v. Liberty Mutual

Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer may reject claimant's testimony when that testimony is "not so clear, direct and positive and so lacking in circumstances tending to discredit it. . . ." Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611, 613 (Tex. Civ. App.-Texarkana 1977, no writ). The hearing officer is not bound to accept the testimony of a claimant at face value. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 70 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 91119, decided February 7, 1992. In short, claimant's testimony alone only raises an issue of fact for the hearing officer who apparently rejected claimant's testimony regarding the injury being caused by repetitive motions. Further, the fact that claimant testified that he relied upon his doctor telling him that his injury was job-related makes the opinion of his doctor, as to causality, more significant than it would have been had the claimant drawn this conclusion without relying on his doctor.

Claimant cites McCartney v. Aetna Casualty & Surety Company, 362 S.W.2d 838 (Tex. 1962); Gill v. Transamerica Insurance Company, 417 S.W.2d 720 (Tex. Civ. App.-Dallas 1967, no writ) and Texas Workers' Compensation Commission Appeal No. 91119, *supra*, for the proposition that an injury that aggravates a claimant's preexisting condition is compensable, provided overexertion or an accident arising out of employment contributed to the incapacity. We do not disagree with that general proposition or that the cited cases support that proposition (although we do not find McCartney particularly applicable). However, the issue in the present case, acknowledged and agreed upon by the parties, was whether claimant sustained a repetitive trauma injury. Aggravation of a preexisting condition is a completely distinct and different situation. Claimant in the present case had the burden to prove a repetitive trauma injury, which is defined as an injury "as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(39); Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993. Although the hearing officer found, as claimant contends, that claimant's duties "included heavy lifting and maneuvering, some out of position welding, frequent standing and walking. . ." those activities, while strenuous at times, ". . .did not establish that these activities were repetitively traumatic and causally related to [claimant's] spine condition." The hearing officer is the sole judge of the weight and credibility to be given to the evidence (Article 8308-6.34(e)) and there is sufficient evidence to support the hearing officer's decision.

Claimant also alleges that "[i]n the first hearing, Mr. M (sic) - hearing officer, ruled that [claimant] had a compensable injury. . . ." We point out to claimant that the "hearing" to which he referred was a benefit review conference (BRC) and (Mr. MA) was the benefit review officer (BRO). A BRC is conducted to attempt to resolve disputes of the parties by agreement. If a dispute is not resolved at the BRC, the BRO will prepare a report which includes the BRO's recommendation regarding each unresolved issue. Article 8308-6.15(d). Consequently, Mr. MA, the BRO, made recommendations which may, or may not,

be followed by the hearing officer.

Claimant submits additional matters including a medical statement that claimant cannot work and various medical bills. We will normally only consider evidence developed at the CCH (Article 8308-6.42(a)) however, we do note there is nothing in the additional documentation which would bear on or change the result of the decision.

Addressing the carrier's contention that the hearing officer's decision was wrong on the grounds that claimant "failed to give his employer notice of his injury within thirty (30) days as required by law," as noted above, the hearing officer is the sole judge of the weight to be given the evidence, and may resolve conflicts and inconsistencies in the testimony. Garza, *supra*. The hearing officer found that claimant ". . .did not know the cause or the nature of his left shoulder pain until November 10, 1992 . . .(and that claimant) reported a work related injury to employer on (date of injury). . . ." We find there is sufficient evidence to support that finding and the conclusion on which it is based, being that claimant established good cause for failing to notify the employer of a work related injury prior to (date of injury).

Accordingly, we find that the determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly or manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge